Filed 1/25/19 Prado v. Sand and Sea, Inc. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHANTALL PRADO et al., Plaintiffs and Appellants, v. SAND AND SEA, INC., Defendant and Respondent.	B278307 (Los Angeles County Super. Ct. No. BC600236)

APPEAL from an order of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Reversed.

Srourian Law Firm, Daniel Z. Srourian; Solouki Savoy, Grant Joseph Savoy and Shoham J. Soulaki, for Plaintiffs and Appellants.

Yarian & Associates and Levik Yarian for Defendant and Respondent.

Plaintiffs Shantall Prado (Prado) and Felecia Scott (Scott) (collectively, plaintiffs) appeal the trial court's order compelling arbitration of certain wage and hour causes of action against their employer, Sand and Sea, Inc., doing business as Shore Hotel (defendant). Because the trial court's order does not compel plaintiffs to arbitrate class claims individually, the exception to the general rule that interlocutory orders are not appealable that is embodied in the "death knell doctrine" does not apply.[1] (See *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 754, 759; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288, abrogated on another ground in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 366.) Nonetheless, we exercise our discretion to treat the appeal as a petition for a writ of mandate and grant the petition. (See, e.g., *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1123.)

During their employment with defendant, plaintiffs received a 56-page employee handbook. Defendant contends plaintiffs are bound by an "agreement to arbitrate" included in the handbook notwithstanding the handbook's "welcome page" (the very first page after the handbook's cover), which states the handbook is not intended to "create any legally enforceable obligations on the part of [defendant] or its employees . . . ." Plaintiffs signed a "policy acknowledgment" form included at the end of the handbook that highlights the handbook's purpose "to provide information . . . regarding various policies, practices and

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[1] Defendant does not argue the order appealed from is non-appealable. We address the issue because it goes to our jurisdiction. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

procedures that apply to them including [the] Arbitration Agreement." The acknowledgement form states employees are expected to have read the 56-page handbook "in its entirety no longer than one week after receiving it."

Although plaintiffs challenged the existence of a mutual agreement to arbitrate in their opposition to defendant's motion to compel arbitration in the trial court, they now present a more robust argument informed by the Court of Appeal's decision in *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781 (*Esparza*)—a case that involves the very same employee handbook at issue here and that was decided only after briefing in the trial court was complete. (*Id.* at p. 784.) Contrary to defendant's argument, plaintiffs are not prohibited from presenting on appeal a legal argument that differs from the legal theory raised in, and addressed by, the trial court—particularly where the argument made relies on intervening authority. (See, e.g., *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; compare *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780 ["The general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied *when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial*"], italics added.)

We agree with the conclusion in *Esparza* that the employee handbook's disclaimer of "any legally enforceable obligations," the emphasis upon its informational purpose, and the recognition that employees would not have read it when they signed the policy acknowledgment form preclude a finding that the parties agreed, expressly or impliedly, to arbitrate disputes. (*Esparza*, *supra*, 2 Cal.App.5th at pp. 789-791.)

We reject defendant's contention that the Court of Appeal's reasoning in *Esparza* does not apply because that was a single-plaintiff tort case and this is a putative wage and hour class action. The handbook's meaning does not vary based on the number of plaintiffs or the nature of the claims against defendant. We also reject defendant's suggestion that we should decline to follow *Esparza* because plaintiffs here had longer to review the handbook than did the plaintiff in *Esparza*; the provisions disclaiming any binding legal obligations would not have taken on a different meaning for plaintiffs with additional study. Finally, defendant is mistaken when it asserts plaintiffs did not allege, like the plaintiff in *Esparza*, that they were required to sign the policy acknowledgment form as a condition of employment. Plaintiffs alleged they felt "like [they] would be immediately terminated" if they did not sign the form. Furthermore, even if signing the handbook was not in fact a condition of employment, that is immaterial—assuming plaintiffs signed the policy acknowledgment on a purely voluntary basis, the handbook, to use its own words, created no "legally enforceable obligation[ ]" to arbitrate for the reasons stated in *Esparza*.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its August 12, 2016, order granting defendant's motion to compel arbitration and to enter a new and different order denying the motion. Plaintiffs shall recover their costs in this proceeding.

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BAKER, Acting P. J.

We concur:

MOOR, J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.